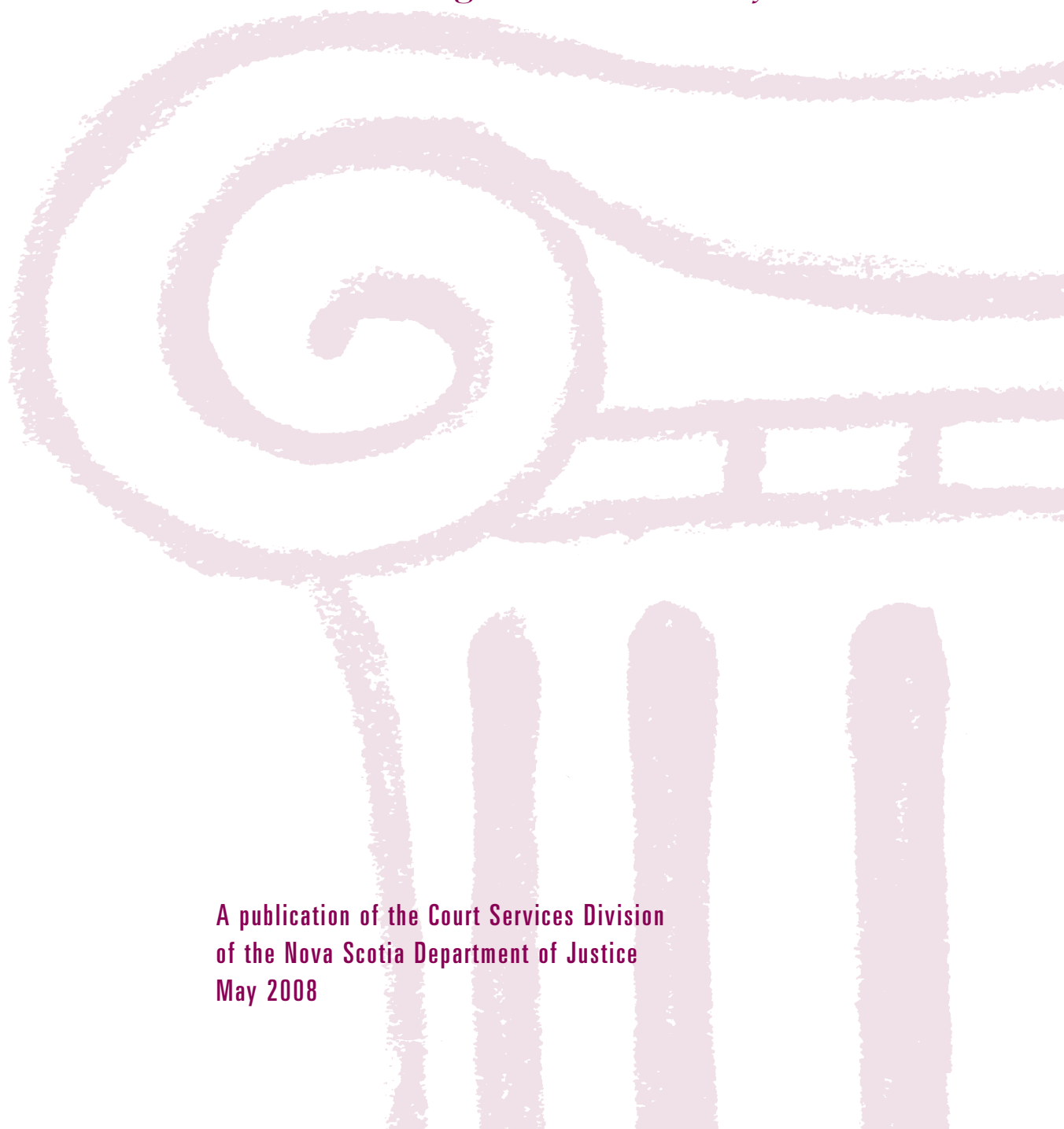


# MEDIATION

## What Do I Need to Know?

A Guide for Using Mediation in Family Law Matters



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# Table of Contents

|   |   |
|---|---|
| About this guide .....  | 1 |
| What is mediation? .....  | 1 |
| How does mediation work? .....  | 1 |
| What are the advantages of mediation? .....                                     | 1 |
| What cases should not go to mediation? .....                                    | 2 |
| What's the difference between mediation and conciliation? .....                 | 2 |
| How can I find out if mediation is for me? .....                                | 2 |
| Questions to ask yourself if you are considering mediation .....                | 2 |
| Can the court order me into mediation? .....                                    | 2 |
| Will it look bad if I choose not to go to mediation? .....                      | 2 |
| What do I need to know about the mediator? .....                                | 3 |
| How do I find a mediator? .....   | 3 |
| How many sessions will I have to attend? .....                                  | 3 |
| Does mediation cost anything? .....   | 3 |
| Do I need a lawyer? .....   | 3 |
| Can someone attend mediation with me? .....                                     | 3 |
| Is mediation confidential? .....  | 4 |
| What is the role of children in mediation? .....                                | 4 |
| What happens when we reach an agreement? .....                                  | 4 |
| What happens when we reach an agreement on some things but not on others? ..... | 4 |
| What happens if we cannot reach an agreement? .....                             | 4 |
| What can I do if I have a concern with the mediation process? .....             | 4 |
| Examples of cases that might be mediated .....                                  | 4 |
| More information .....  | 5 |

## About this guide

This guide has been prepared by the Nova Scotia Department of Justice to help people who might use mediation and to help court staff, lawyers, and health professionals decide when mediation should be used for resolving disputes in family law matters. It also provides useful information about what can be expected of the mediation process.

Dispute resolution methods such as mediation are increasingly recognized as valuable tools for settling differences, especially in family law. For many people, mediation can provide a flexible way of dealing with a dispute, because it can be suited to meet different needs and interests. When exploring mediation as an appropriate choice in family law matters, it is important to assess whether

- each person has freely chosen to take part
- each person will be safe in the mediation process
- each person can state his or her own views on the issues to be resolved

Mediation is not a good choice when either person in the dispute is not willing to take part, there has been abuse in the relationship, or for other reasons that make it difficult for one or both people to express their needs and interests.

This guide provides practical information on what mediation is, when it is best used, and how to find a mediator. There are many details to consider, however. Be sure to ask questions of a mediator or discuss your options with a court officer, lawyer, or other knowledgeable professional. At the end of the guide there are internet web sites you can use for more information.

## What is mediation?

In family law matters mediation involves a neutral third party who assists you and the other person in a family dispute to come to an agreement about custody, access, support or maintenance, and property. The mediator will help you and the other person identify your needs, clarify issues, and, where possible, reach a workable agreement

that fits your particular situation. If an agreement is reached, it can be put before a judge and serve as the basis of a consent order. If this happens, you may not have to appear in court.

## How does mediation work?

Pre-mediation is the first step to explore whether mediation is appropriate and workable in your case. All cases must go to pre-mediation before going to mediation. A mediator meets with you alone and then with the other person, at a separate time, to discuss whether mediation is a suitable option.

If mediation is appropriate, each person will sign the Agreement to Mediate, which outlines the way the mediation will be carried out. You will then begin to meet together with the mediator (sometimes you may still meet separately) to help you both identify your needs and interests. With the assistance of the mediator, you then consider and develop options that are acceptable to you and the other person. The mediator must remain neutral and, therefore, will not provide legal advice. Mediators are also not permitted to conduct counselling or therapy or assessments in the cases they are mediating.

## What are the advantages of mediation?

- You may not have to go to court.
- You may save time and money.
- You have a greater say in the decisions about your own family.
- You work toward creating an agreement that considers your needs and interests and those of your former partner.
- Your children (and you) can benefit when you settle differences in a positive manner.
- You may improve communication that may help in future contacts (i.e. parenting) with the other person.
- You have the privacy to discuss sensitive issues.
- You can clarify issues, needs, and interests.

## What cases should not go to mediation?

Mediation is not a good choice if

- either person does not want to mediate
- there is physical violence or emotional abuse, or a history of abuse that may suggest a risk to safety and fair negotiation
- there are threats or coercion in the relationship or in going to mediation
- there is a pattern of control and manipulative behaviour in the relationship
- there are risks to the safety of either person, children, or others
- there are serious mental health concerns or addictions (especially if it suggests a risk to safety and fair negotiation)
- either person does not bargain in good faith (for example, holds back information) or will not abide by the Agreement to Mediate.

## What's the difference between mediation and conciliation?

In the Supreme Court (Family Division) the court officer may conduct a process called conciliation. Conciliation includes meeting with the court officer to identify the issues in your case, to help the parties to exchange necessary information, to clarify the positions of the parties, to facilitate negotiations between the parties, and to determine the next step(s) appropriate in resolving the issues.

Mediation is a separate process, which allows you more time to discuss and negotiate with the other person. Also, in mediation the records of your discussion are confidential.

## How can I find out if mediation is for me?

- You can consider your options when you discuss your situation with a court officer.
- You can consult a lawyer to determine if mediation is suitable.

- You can discuss your situation with the mediator in pre-mediation, before mediation takes place.

## Questions to ask yourself if you are considering mediation

Do I want a say in how my case is decided?

Can I speak for myself?

Can I make decisions about what I need and want?

Am I willing to talk directly with the other person?

Can I be in the same room with the other person without being afraid?

Can I make my views heard with the other person?

Can I focus on the issues to be resolved, not on the person?

What do I want?

What are my facts?

What information or documents do I need?

Am I willing to compromise?

Am I willing to explore different solutions to the conflict?

How can I be sure the other person will uphold his/her part of the agreement?

What can I do if we can't come to an agreement?

## Can the court order me into mediation?

Judges do not order people into mediation, because it is a voluntary process. At times, however, a judge may discuss with you or your lawyer whether mediation is an appropriate option to help you in resolving your dispute. The judge can adjourn your case and refer you to pre-mediation where you can discuss with the mediator whether you want to proceed with mediation.

## Will it look bad if I choose not to go to mediation?

No mediator or member of court staff will inform the court of your reasons for not choosing mediation. The court will only be informed that no agreement was reached. It is

possible that you will be asked why you chose not to mediate when you are giving evidence on the stand in court.

## What do I need to know about the mediator?

Mediators come from a wide variety of professions and use different styles of mediation. Important things to look for include experience, reputation, educational credentials, mediation training, apprenticeship, gender, age, cultural background, knowledge of a particular field, and membership in a mediation organization such as Family Mediation Nova Scotia.

Mediators on the Roster of the Supreme Court (Family Division) have completed a selection process based on a set of criteria adopted from Family Mediation Nova Scotia. They are all experienced professionals either in the field of social work or law.

## How do I find a mediator?

If you have been referred by a court officer in the Supreme Court (Family Division), they will give you the name of the mediator assigned to your case. If not, you can contact the Family Division or Family Court yourself, and they will provide you with a list of mediators who will provide the service for a fee. You can find mediators through Family Mediation Nova Scotia and the telephone book. See page 5 for more information.

## How many sessions will I have to attend?

The number of sessions you attend is up to you, the other party and the mediator. If you attend mediation through the Supreme Court (Family Division), a limited number of sessions will be paid for or subsidized, based on the issues to be resolved.

## Does mediation cost anything?

Generally mediators charge a fee based on a per hour or per session rate. If you attend mediation in the Supreme Court (Family Division) there is a sliding scale of fees

based upon your income. Ask a court staff person for a copy of the fee schedule.

## Do I need a lawyer?

A lawyer is recommended to provide independent legal advice throughout the mediation process. Lawyers have many functions to perform in connection with their clients' participation in mediation. Your lawyer can

- provide initial legal advice, which includes possible options and their consequences including a recommendation based on your needs and goals
- help you determine if it is in your best interest to take part in mediation
- review legal documents such as deeds, promissory notes, employment contracts, partnership agreements, and prior court orders to educate you about what the documents mean, which documents are important, and how to use them during mediation
- attend and participate in the mediation session if this is agreeable to you, the other party, and the mediator; alternatively, they may remain indirectly involved by providing advice to you before, during, or after mediation sessions
- review the draft agreement reached and have the agreement filed with the court as a consent order

If issues remain unresolved your lawyer can continue the legal process by preparing you for trial or a settlement conference. At a settlement conference, you will meet with a judge and the other party to discuss the issues in your case. The judge will not decide your case, but may give an opinion to assist with negotiations. If no agreement is reached a different judge will hear the trial.

## Can someone attend mediation with me?

You have the option of having a support person, such as a friend or family member, attend the mediation sessions with you. However, this must be agreed upon by the other party and the mediator. Their role, if they attend, is to support you and they do not take an active part in the process.

## Is mediation confidential?

Mediation is considered a closed process, which means all communication, documentation, and recorded notes used in mediation are treated as confidential, and the mediator cannot be called as a witness in any court proceeding. The mediator will not disclose any information without your permission and that of the other person. There are exceptions to this where required by law including child abuse and abuse of vulnerable adults. It is important to ask your mediator about their policy on confidentiality.

## What is the role of children in mediation?

The role of the children in mediation will be up to you, the other parent or guardian, your children, and the mediator. Although the children are often an important focus of the mediation, their direct involvement may not be appropriate because they are too young and the decisions need to be made by the parents or other guardians. However, in some circumstances, if the children are teenagers, for example, it may be important for them to be involved to discuss their views about decisions affecting them.

## What happens when we reach an agreement?

The mediator can draft an agreement, however, this agreement should be reviewed by your lawyer. You will be given this opportunity before signing. This agreement can form the basis of a court order that will be issued by the judge.

## What happens if we reach agreement on some things but not on others?

If you can agree on some of the legal issues, the mediator can draft an agreement to cover the areas which you have agreed upon. It can form the basis of a court order. The areas that can't be resolved by mediation can be referred to your lawyers or can be presented in court for the judge to make a decision.

## What happens if we cannot reach an agreement?

If you cannot agree, the mediator will refer you to your lawyer or a court officer to discuss your options. The court will be informed only that you were not able to reach an agreement through mediation. In closed mediation, the details of discussions during mediation are not disclosed to the court.

## What can I do if I have a concern with the mediation process?

You can choose to end mediation at any time if you are uncomfortable with the process. If you have questions or concerns, you can raise these with the mediator. If you are not satisfied with the service you received from a mediator selected from the court list of mediators, you can write the Director of Court Services, Department of Justice at 5151 Terminal Road, P.O. Box 7, Halifax, Nova Scotia, B3J 2L6.

## Examples of cases that might be mediated

- A) Susan and Peter cannot agree on how their time will be spent with their four-year-old son Kevin. They have agreed to joint custody but not how they will share parenting. They need some help in managing their discussion so they hear each other's views. They want to arrive at an agreement that is best for their son and one that they can both live by.
- B) Terry and Lilian have three teenage girls, ages 12, 14, and 16. They have not been able to decide on what the living arrangements will be for the girls and how much financial support Terry will provide to Lilian. They want an opportunity to talk to each other and to their children so they can decide together what is the best arrangement for their girls.

## More information

### *Websites:*

|                                     |  |
|-------------------------------------|--|
| Family Mediation Canada             | <a href="http://www.fmc.ca">www.fmc.ca</a>                             |
| Department of Justice (Canada)      | <a href="http://www.canada.justice.gc.ca">www.canada.justice.gc.ca</a> |
| Department of Justice (Nova Scotia) | <a href="http://www.gov.ns.ca/just">www.gov.ns.ca/just</a>             |
| The Courts of Nova Scotia           | <a href="http://www.courts.ns.ca">www.courts.ns.ca</a>                 |

### *Finding a Mediator:*

Try looking under Mediation-Services in the yellow pages, or contact the court administration office, your lawyer, community service offices, co-workers, and family members for referrals to a mediator.

